IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.111 OF 1996

1. Pan India Paryatan Limited,
a Company incorporated under
the Companies Act,1956 and having
its Registered office at 135,
A.B.Road,Worli,
Bombay - 400 018.

2. Shri Ashok Goel of Bombay,
Indian Inhabitant being the
Director and Shareholder of the
1st Petitioner abovenamed
having his office at 135,
A.B.Road, Worli,
Bombay - 400 018. ..Petitioners

Versus

1. The State of Maharashtra
Through Government Pleader

2. The Collector, Bombay Suburban
District having his office at
BMRDA Bldg., 4th Floor,
Bandra (East), Bombay - 400 051.

3. Additional Collector, Bombay Suburban
District having his office at
BMRDA Bldg., Second Floor,
Bandra Kurla Complex,
Bandra (East), Bombay-400051. ..Respondents

Dr.V.V.Tulzapurkar with S.Parekh i/b. S.D.D.& Phatarphekar for the Petitioners.

Mr.K.R.Belosey, Government Pleader for Respondent - State.

WITH
WRIT PETITION NO.2009 OF 1998

1. Pan India Paryatan Limited,
a Company incorporated under
the Companies Act,1956 and having
its Registered office at 135,
A.B.Road,Worli,
Bombay - 400 018.

2. Shri Ashok Goel of Bombay,
Indian Inhabitant being the
Director and Shareholder of the
1st Petitioner abovenamed
having his office at 135,
A.B.Road, Worli,
Bombay - 400 018. ..Petitioners

Versus

1. The State of Maharashtra

2. The Collector, Bombay Suburban
District having his office at
BMRDA Bldg., 4th Floor,
Bandra (East), Bombay - 400 051.

3. District Officer, Bombay Suburban
District having his office at
BMRDA Bldg., Second Floor,
Bandra Kurla Complex,
Bandra (East), Bombay-400051. ..Respondents

Dr.V.V.Tulzapurkar with S.Parekh i/b. S.D.D.& Phatarphekar for the Petitioners.

Mr.Birendra Saraf, Special Counsel for Respondent - State.

CORAM : DR.S.RADHAKRISHNAN &
SMT.V.K.TAHILRAMANI,JJ.

DATE : 19TH DECEMBER,2006

JUDGMENT (PER : DR.S.RADHAKRISHNAN,J.)

1. By this common Judgment, we are disposing of Writ Petition No.111 of 1996 and Writ Petition No.2009 of 1998, which involves interpretation of certain provisions of Bombay Entertainment Duty Act,1923 (hereinafter referred to as "The Act") pertaining to amusement park.

2. The undisputed facts are as follows:-

. The Petitioners own and run an amusement park within limits of Greater Bombay, which opened to public for admission on 25th December,1989. The Petitioners charge a lumpsum amount for admission and entertainment to the amusement park, and are required to pay entertainment duty for admission to the park.

3. The Petitioners, by a letter dated 4th October,1994 sought confirmation that entertainment tax to be levied at that time would be 3.75% of value of consolidated ticket. By a reply dated 12th October,1994, Respondent No.2 confirmed the same. However, by a Communication dated 7th January,1995 by Respondent No.3 in view of clarification received from Revenue and Forest Department of Respondent No.1 vide letter No.ENT/3894/CR-227/7-1 dated 19th December,1994, informed Petitioners that they would be required to pay duty at the rate of 7.5% and not 3.75%, and called upon the Petitioners to pay the same within seven days. Petitioners preferred Writ Petition No.37 of 1995 challenging legality and validity of communication dated 7th January,1995. By an order of this Court, Petitioners were permitted to withdraw the Petition with a liberty to file a fresh Petition. The Petitioners made a representation to Respondents. The latter reiterated their stand.

Petitioners have paid duty under protest and continue to do so. The Respondents seek to recover entertainment duty at the rate of 7.5% in respect of entry to park for the period of 16th September,1994 to 24th December,1994 and at the rate of 15% from 25th December,1994, from the Petitioners.

4. The Petitioners have filed Writ Petition No.111 of 1996 challenging the legality & validity of action of Respondents in seeking to recover entertainment duty at double the statutorily prescribed rate i.e. at the rate of 7.5% instead of 3.75% for period of 16th September,1994 to 24th December,1994. Another Writ Petition No.2009 of 1998 has been preferred challenging action of Respondent in seeking to recover duty payable during 25th December,1989 to 23rd August,1990 already adjusted against refund payable to the Petitioners. The questions arising out of the two Writ Petitions are, as follows:

i. Rate of entertainment duty payable by the Petitioners for a period from 16th September,1994 to 24th December,1994.

ii. Rate of duty payable for the period commencing 25th December,1994.

iii. Whether action of Respondents in seeking to recover duty payable during 25th December,1989 to 23rd August,1990 already adjusted against refund payable to Petitioners, is justified & valid in law. This question is raised by Writ Petition No.2009 of 1998.

5. In the course of the judgment, contentions and submissions of two Petitions are enumerated separately:-

. In Writ Petition No.111 of 1996 Dr.Tulzapurkar, the learned Senior Counsel appeared on behalf of the Petitioners. It was putforth that on a plain reading of Section 3 of the Act, it is clear that Petitioners are entitled to benefits available under the said Section providing for payment of entertainment duty. It was argued that legislative intent has to be inferred from language of the provisions and if the Respondents' contention is accepted, then it would mean that the word "other than amusement parks" will have to be read in Section 3(2) of the Act. In the case of **Mathuram Agarwal Vs. State of Madhya Pradesh AIR 2000 SC 109** in paragraph No.11 the Hon'ble Supreme Court has held "the intention of the legislature in a taxation statute is to be gathered from language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of statute more than what is stated in plain language. It is not the economic result sought to be obtained by making the provisions which is relevant in interpreting a fiscal statute. .....Words cannot be added or substituted so as to give meaning to statute which will serve the spirit and intention of legislature."

Also in the case of **A.V.Fernandez Vs. State of Kerala AIR 1957 SC 657** in paragraph No.29, the Hon'ble Supreme Court had held that "It is no doubt that in construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law." Further, it laid down that ..... "if the case is not covered within the four corners of provisions of taxing statute, no tax can be imposed by inference or analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter." Reliance was also placed on **Sales Tax Commissioner Vs. Modi Sugar Mills AIR 1961 SC 1047**. The case disregarded equitable considerations and presumptions in case of interpretation of a taxing statute.

6. In the light of the cases cited, the learned Senior Counsel Dr.Tulzapurkar strongly contended that the Petitioners are entitled to the benefits of the concessional rate of duty provided in sub section 5(a) of Section 3 of the Act, inserted by Maharashtra Ordinance No.XVI of 1992, for period of 25th December,1992 to 24th December,1994. Dr.Tulzapurkar submitted that recovering duty at the rate of 7.5% is case of total misreading of provisions of Act. Respondents, as it was put forth, had failed to take into account the benefit available to the Petitioners

under sub-section 5(a) of Section 3 for the period of 4th & 5th year of commencement of the park to grant concession in case of amusement parks and the abovementioned provision provides for concession and exception. Further, the benefit of concessional rate of duty provided therein would be applicable irrespective of rate of duty specified in Section 1(b) of the Act.

7. It was putforth by Dr.Tulzapurkar that provisions of Sub Section(2) of Section 3 of the Act are required to be construed by interpreting the words as appearing therein and without adding any words such as "other than in case of amusement parks". The learned Senior Counsel submitted that the language and words of the aforesaid provisions clearly point out that the Petitioners are governed by the provisions of Section 3(2) of the said Act.

8. It was submitted by the learned Senior Counsel that the construction of Section 3(2) in a manner to exclude amusement parks therefrom would be to defeat the very purpose and object of granting exemption. In the case of **Commissioner of Income Tax, Banglore, Vs. M/s.Shaan Finance (P) Ltd., Banglore AIR 1988 SC 1372** it was held that "The court must interpret the statute as it stands and in case of doubt, in a manner favourable to tax payer." The learned Senior Counsel for the Petitioners sought to point out that impugned

actions of Respondents would be out of the scope of the principles so laid down. The above principle in spirit is also adopted in case of **Commissioner of Sale Tax Vs. Industrial Coal Enterprises, AIR 1999 SC 1324**.

9. The learned Senior Counsel for the Petitioners contended that the Respondents are seeking to recover the amount under the guise of tax in violation of Articles 265 and 300A of the Constitution of India. The impugned action is clearly unreasonable and violative of Article 14 of the Constitution of India. It was further submitted by the learned Senior Counsel that the impugned action has an effect of an unreasonable restrictions on the Petitioners right to carry on business under Article 19(1)(g) of the Constitution of India.

10. It is the argument of the Petitioners that Respondent No.2 himself having accepted effective rate of duty payable in respect of amusement park at the rate of 3.5% for the period from 16th September,1994 to 24th December,1994, impugned action seeking to recover at the rate of 7.5% without affording any opportunity of being heard to the Petitioners is in gross violation of principles of natural justice and the same is a nullity.

11. The petitioners have prayed for a Writ prohibiting Respondents, their servants and agents from, in any manner recovering the entertainment duty at the rate of 7.5% during 16th September,1994 to 24th December,1994 and at 15% thereafter. Further, the Petitioners have prayed for a Writ of Certiorari to examine the legality and validity and quash impugned communication dated 7th January,1995.

12. The learned Government Pleader, Mr.Belosey strongly contended that Section 3(2) of the Act ought to be construed to exclude "amusement park". Mr.Belosey submitted that there was no necessity to incorporate the words "other than amusement park", in Section 3(2) of the Act. Mr.Belosey submitted that by resorting to Section 3(2) of the Act, the Petitioners are trying to get double concession, and as such Section 3(2) of the Act should be construed to exclude amusement park.

13. The Petitioners have filed Writ Petition No.2009 of 1998 challenging interalia, the legality and validity of the action of Respondents in seeking to recover entertainment duty payable during the period 25th December,1989 to 23rd August,1990 already adjusted against refund payable to the Petitioners in accordance with order of Respondent No.2 dated 30th December,1993 on the ground that the Auditor General has objected to such an adjustment being made.

14. The learned Senior Counsel Dr.Tulzapurkar for the Petitioners submitted that the effect of the 1992 amendment of Bombay Entertainments Duty Act, 1923, by Maharashtra Ordinance No.XVI of 1992, is that w.e.f. 25th December,1989, no entertainment duty was payable by Petitioners for a period of first 3 years and for the subsequent 2 years at the rate of 50% of duty leviable under Section 3 of the Act and thereafter duty payable at the rate specified under Section 3. The Petitioners therefore contend that in view of aforesaid Section 3(5)(a) of Act, the Petitioners became entitled to refund of entertainment duty paid for the period 25th December,1989 to 30th December,1993.

15. The office of Second Respondent by communication, informed the Petitioners that tax payable for that period amounting to Rs.81,22,828/- be adjusted out of refund claimed and balance of Rs.12,68,516.64 be adjusted against duty payable after 2nd December,1993. The third Respondent communicated to the Petitioners, after five years of granting refund, interalia informing them about objections of Auditor General to adjustments made against arrears in future payment of duty. By the said communication, the Petitioners were informed that the refund to be illegal, Petitioners were directed to pay Rs.93,91,345.54 on the ground that adjustment against

future liability amounts to an indirect refund resulting in unjust enrichment to the proprietor and the same is not legally permissible.

16. The learned Senior Counsel for the Petitioners submitted that Respondents have no jurisdiction or authority of law to retain what is collected without authority of law. Under Section 9C of the Act, Respondents are bound to refund entertainment duty paid in excess of the duty payable. It was further submitted that there is no provision in law to seek to recover the said refund back on ground of doctrine of unjust enrichment, however, the learned Senior Counsel submitted that the said doctrine is not applicable in the present case. It was contended that there is nothing on record to show that the Petitioners have recovered any entertainment duty from visitors of Park, as no entertainment duty was separately charged and recovered.

17. Further, as it was contended by the learned Senior Counsel that impugned action of Respondent in seeking to recover the amount already refunded on the ground of unjust enrichment would render provisions of Section 9C of the Act redundant.

18. The Petitioners also submitted that the impugned communications seeking to recover refunded amount were issued in gross violation of principles of

natural justice, denying an opportunity of being heard before issuance of the communications. The Petitioners finally submitted that the impugned actions & communications are invalid, being violative of Articles 265 & 300A of Constitution of India and are liable to be set aside.

19. The Petitioners have prayed for in Writ Petition No.2009 of 1998 for a writ of Certiorari or any other appropriate Writ, order or direction under Article 226, calling for records of impugned communications dated 15th May,1998 and 30th May,1998, going into their legality and validity and quash the said orders. They have further prayed for a Writ of Mandamus directing the Respondents to (i) withdraw and cancel the said communications and (ii) quash and set aside the impugned communications.

20. Mr.B.Saraf, the learned Counsel appeared on behalf of the Respondent State has placed reliance on two decisions given by the Hon'ble Supreme Court on the point of unjust enrichment.

21. In the case of **State of MP Vs. Vyankatlal & Another (1985)2 SCC 544**, the burden of paying the amount in question was transferred by Respondents to purchasers and therefore, they were not entitled to get a refund. The amount was to be deposited in the fund created for development of sugar-cane. The

Hon'ble Supreme Court held that there would arise no question of refunding the amount to the Respondents in that case, who had not eventually paid the amount towards the Fund, as doing so would virtually allow Respondents unjust enrichment.

22. In another case **Entry Tax Officer, Banglore & Ors. Vs. Chandanmal Champalal & Co. & Ors. 1994(4) SCC 463**, the Hon'ble Supreme Court did not agree with view of Karnataka High Court insofar as it directed refund of amount found to be paid in excess of legal liability to Respondents. The Court held that directions of such nature would allow unjust enrichment. The Court considered the decisions of **State of MP Vs. Vyankatlal (Supra), Amar Nath Om Prakash Vs. State of Punjab (1985) 1 SCC 345 and Indian Oil Corporation Vs. Municipal Corporation, Jallandhar 1993(1) SCC 333**. It was held therein that it is a normal presumption that duty is passed on to the purchasers/consumers. The burden of proof to establish otherwise is on person who alleges it; and in absence of any such allegations, a direction of refund is not called for. Hence, Mr.Saraf submitted that the Petitioners should establish that there was no unjust enrichment.

23. To understand the entire controversy, it would be necessary to consider the following provisions of Bombay Entertainment Duty Act,1923:-

Section 2(a-1) :- "amusement park" means a place wherein various types of amusements including games or rides or both [but excluding exhibition by cinematograph and video exhibition] are provided fairly on permanent basis, on payment for admission;

(a): "entertainment" includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment, [or, in the case of television exhibition with the aid of any type of antenna with a cable network attached to it or cable television, for which persons are required to make payment by way of contribution or subscription or installation and connection charges or any other charges collected in any manner whatsoever] [but does not include magic show].

(b): payment for admission" [in relation to the levy of entertainments duty,] includes-

(i) any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required,

Section 3(1): There shall be levied and paid to the state Government on all payments for admission to any entertainment [except in the case of video games exhibition by means of any type of antenna or cable television] a duty (hereinafter referred to as "entertainments duty") at the following rates, namely :-

(b) In the case of every entertainment, [other than exhibition by cinematograph including video exhibition [video games and exhibition by means of any type of antenna or cable television]

Provided further that, the entertainment duty in respect of an amusement park shall be 15 per cent of the payment made for admission to the amusement park, including payment made for admission for games and rides, whether charges separately or not,

Section 3(2): Where the payment for admission to an entertainment is made by means of a lumpsum paid as a subscription or contribution to any society, or for a season ticket or for the right of admission to a series of

entertainments or to any entertainment during a certain period of time, or for any privilege, right, facility or thing combined with the right of admission to any entertainment or involving such right of admission without further payment or at a reduced charge, [the entertainment duty shall be levied and paid on 50 per cent of such lumpsum at the rates specified in clause (b) of sub-section (1).

Section 3(5)(a): Notwithstanding anything contained in sub-section (2) or in any other provisions of this Act but subject to the provisions of clause (b), on and with effect from the 25th December,1989, there shall be levied, and paid by the proprietor to the State Government, the entertainments duty in respect of an amusement park in the following manner, namely :-

(i) for the first three years from the date of commencment of the amusement park, no duty ;

(ii) for the subsequent two years, at the rate of fifty per cent, of the rate of duty leviable under clause (b) of sub-section (1) or, as the case may be, sub-section (2) of section 3;

(iii) from the sixth year, full amount of entertainments duty leviable at the rate specified in clause(b) of sub-section(1) or, as the case may be, sub-section (2) of section 3.

Explanation - For the purpose of this sub-section,

(i) the date on which an amusement park is opened to the public for admission shall be deemed to be the date of commencemnt of the amusement park;

(ii) the change in the management of the amusement park or the change in the games or rides in the amusement park shall not be construed as a fresh commencement of the amusement park.

(b) the concession of duty under clause(a) shall be available to the proprietor of an amusement park if, and only if, the amusement park is continued at the same place where it has commenced and continuously for ten years and if it is not so continued, the duty shall be levied from the date of commencement of the

amusement park at the rates specified in clause (b) of sub-section (1) or as the case may, sub section (2) of section 3 and the proprietor shall be liable to pay the same.]

Section 9C: Where a proprietor has paid entertainment duty in excess of the duty payable, the amount of duty paid in excess shall, on an application made by the proprietor in that behalf, be refunded to him by the Collector after such verification as may be necessary and in such manner as may be prescribed.

24. A bare perusal of Section 3(1)(b) proviso, read with Section 3(2) of the Act makes it clear that the entrertainment duty to be levied for Amusement Park would be fifty percent of 15%, which comes to 7.5%. Thereafter if one takes into account Section 3(5)(a) & (b) of the Act, it would be fifty percent of the above. That is to say 3.75%. Therefore if one were to read all the above provisions, i.e. Section 3(1)(b), Section 3(2) and Section 3(5)(a) & (b) of the Act, for the first three years, in case of an Amusement Park, there will be no entertainment duty, for the subsequent two years, the entertainment duty would be 3.75% (i.e. 4th & 5th year). Thereafter from the Sixth year onwards, the entertainment duty would be 7.5%.

25. The Legislature was very much aware of Section 3(2), when Section 3(5)(a) and (b) were introduced by way of amendment. It is very pertinent to note that Section 3(5)(a) as well as (b), very specifically refers to Section 3(2). One has to give effect to all

the provisions of the Act. The argument of the learned Government Pleader Mr.Belosey, that one has to read into Section 3(2) to exclude amusement park, cannot be sustained. If the Legislature had intended to do so, in Section 3(2), it would have been provided as "other than amusement park". One cannot infer such words in Section 3(2). The Statute has to be read as it is, and one cannot add words which are not there.

26. Therefore on a bare reading of Section 3(1)(b) proviso, Section 3(2) and Section 3(5)(a) and (b) as far as amusement park is concerned, the following will be the pattern of levy of entertainment duty:-

i) For the first three years after commencement, there will be no duty,

ii) For the 4th and 5th year, the duty will be 3.75%,

iii) From 6th year onwards, the duty payable would be 7.5%.

27. After hearing all the learned Counsel for the parties, and after considering the judgments cited, and in the light of the provisions of the Act, mainly Sections 3(1)(b), Section 3(2) and sub Section 5(a) and (b) of the Act, we hold that the rate of tax payable by Petitioners, would be as follows :-

i. For the first three years from date of commencement of park the Petitioners are not required to pay any duty,

ii. Duty for the 4th and 5th year, from the date of commencement, duty payable is at the rate of 3.75%, applying concessional provision.

iii. Duty payable during 6th year from the date of commencement of park and thereonwards, is at rate of 7.5%.

28. We also hold that in response to question whether Section 3(2) is applicable to amusement parks, the provision has not expressly been excluded nor indicated exclusion of amusement parks defined in Section 2(a-1) of the Act. It is imperative to consider the ratio in paragraph No.11 of **Sale Tax Commissioner Vs. Modi Sugar Mills (Supra),** where the Supreme Court has held that taxing statutes cannot be interpreted on the basis of assumptions or presumptions. "The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed, it cannot import provisions in the statutes so as to supply any assumed deficiency."

29. The first two questions as regards the rate of duty payable by the Petitioners are answered as mentioned hereinabove.

30. The answer to the third question raised, we hold that the burden of proof in justifying that the benefit has not been passed on to the Consumer and in

fact that there is no case of unjust enrichment, rests on the Petitioners. It is upon the Petitioners to produce sufficient material to establish their case against unjust enrichment. The Petitioners are at liberty to approach the appropriate authority for the said purpose, with all the relevant material and the appropriate authority to decide the same expeditiously.

31. Rule is made absolute in both the above Petitions in terms of the above, however with no order as to costs.

(DR.S.RADHAKRISHNAN,J.)

(SMT.V.K.TAHILRAMANI,J.)